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Peering into the Corporate Soul: Hobby Lobby Stores, Inc. v. Sebelius and How for-Profit Corporations Exercise Religion

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PEERING INTO THE CORPORATE SOUL: *HOBBY LOBBY STORES, INC. V. SEBELIUS* AND HOW FOR-PROFIT CORPORATIONS EXERCISE RELIGION

ABSTRACT

Amidst the storm of legal challenges to the Affordable Care Act and its contraceptive mandate, religious business owners have unearthed an entirely novel question of constitutional law: are for-profit corporations entitled to the protections of the First Amendment's Free Exercise Clause? The answer to this contentious question raises issues involving several fundamental areas of law, such as of statutory interpretation, corporate structure and governance, and First Amendment jurisprudence. The Circuit Courts of Appeals are split over how to answer it, and recently the Supreme Court granted certiorari to resolve it. In *Hobby Lobby Stores, Inc. v. Sebelius*, the Tenth Circuit held that for-profit corporations are entitled to free exercise rights. Its opinion articulates the one of the most detailed and thorough analyses on this issue, which will likely play a significant role in the Supreme Court's decision.

This Comment argues that the majority opinion in *Hobby Lobby* correctly held that for-profit corporations are capable of exercising religion and are entitled to free exercise rights. However, the Comment contends that the majority failed to adequately distinguish between the religious exercise of the corporation and its constituents, and it proposes a test to assist courts in identifying a corporation's religious beliefs.

TABLE OF CONTENTS

INTRODUCTION

The 2010 Patient Protection and Affordable Care Act (ACA)[1] and contraceptive mandate[2] promulgated by the Department of Health and Human Services (HHS) has prompted a flurry of challenges and litigation from both religious and nonreligious entities alike.[3] These challengers allege that the contraceptive mandate forces them to violate their sincerely held religious belief that life begins at conception.[4] They believe that providing contraceptives that act as abortifacients, such as Plan B and Ella, is a sin.[5] After HHS adopted the contraceptive mandate, it established several exemptions for "religious employers" but did not extend an exemption to for-profit corporations.[6]

As a result, the ACA and contraceptive mandate have unearthed an entirely novel question in constitutional law: whether for-profit corporations and entities can exercise religion and thus receive the protection of the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause.[7] Not only is this issue novel, but the circuits are currently split regarding how to resolve it.[8]

Hobby Lobby Stores, Inc. v. Sebelius[9] is the Tenth Circuit's interpretation of this issue and is currently one of the most thorough analyses supporting the claim that for-profit corporations are: (1) capable of exercising religion and (2) entitled to protection under RFRA and the Free Exercise Clause.[10] Sitting en banc, the Tenth Circuit delivered an opinion

1. 42 U.S.C. § 18001 (2012).
2. *See* 45 C.F.R. § 147.130(a)(1)(iv)(A) (2013).
3. During the publication of this Comment, the Supreme Court granted certiorari and delivered an opinion on June 30, 2014. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014). However, the information in this Comment focuses on the Tenth Circuit opinion and is current as of February 24, 2014.
4. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).
5. *See, e.g., id.*
6. *Id.* at 1123–24.
7. *See, e.g., id.* at 1120–21.
8. *See* Jonathan T. Tan, Comment, *Nonprofit Organizations, For-Profit Corporations, and the HHS Mandate: Why the Mandate Does Not Satisfy RFRA's Requirements*, 47 U. RICH. L. REV. 1301, 1332 (2013).
9. 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).
10. *Id.* at 1129.

in *Hobby Lobby* that provides an in-depth analysis of the proper statutory interpretation of RFRA, the constitutional free exercise precedent, and the basic law of corporations.[11]

The Supreme Court granted certiorari in November 2013[12] and will likely release a decision in June 2014. Based on the Court's controversial decision *Citizens United v. Federal Election Commission*[13] in 2010, which expanded corporations' First Amendment free speech rights, there is a strong possibility that the Court will affirm the Tenth Circuit's decision.[14]

This Comment provides a detailed analysis of *Hobby Lobby* and associated decisions, and ultimately concludes that the majority opinion in *Hobby Lobby* correctly decided that for-profit corporations are entitled to free exercise rights. However, it asserts that the majority opinion failed to adequately distinguish between the religious beliefs of the *corporation* and the beliefs of its *constituents*. In order for the *corporation* to receive free exercise protection and for courts to uphold the fundamentals of corporate law, it is imperative that courts identify which religious beliefs and actions belong to the corporation and which beliefs belong to the individuals who own and operate them. Finally, this Comment proposes a test, based on the basic tenets of corporate law, for identifying a corporation's religious beliefs.

I. BACKGROUND

A. Free Exercise Clause, Smith, *and RFRA*

The First Amendment to the United States Constitution states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[15] The Free Exercise Clause protects religious beliefs and the exercise thereof and prohibits the government from regulating or coercing action contrary to those beliefs.[16] This protection extends to individuals[17] as well as organizations, corporations, and associations that exercise religion.[18]

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11. *See generally id.* at 1129–46.
12. Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678 (2013).
13. Citizens United v. FEC, 558 U.S. 310, 365 (2010).
14. However, the Supreme Court also granted certiorari to hear *Conestoga Wood Specialties Corp. v. Secretary of the U.S. Department of Health and Human Services*, 724 F.3d 377 (3d Cir. 2013), a Third Circuit case, and consolidated the appeals. *See* Conestoga Wood Specialties Corp. v. Sebelius, 134 S. Ct. 678 (2013). In *Conestoga*, the Third Circuit ruled in favor of the government. 724 F.3d at 417. Consequently, it remains unclear how the Court will resolve this issue.
15. U.S. CONST. amend. I.
16. GEORGE BLUM ET AL., 16A AM. JUR. 2D *Constitutional Law* § 443 (2013).
17. *See, e.g.*, United States v. Lee, 455 U.S. 252, 254 (1982) (addressing whether payment of Social Security tax for employees substantially burdens an individual Amish employer's religious beliefs).
18. *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 423 (2006) (affirming claim brought by a religious entity on its own behalf).

Prior to 1990 and the Supreme Court's decision in *Employment Division v. Smith*,[19] the Court reviewed free exercise claims with strict scrutiny: if the plaintiff proved that the government law or regulation substantially burdened its sincere religious belief, the burden shifted to the government to demonstrate a compelling state interest for the law.[20] However, *Smith* overruled the "compelling interest" test and held that "a valid and neutral law of general applicability" is sufficiently constitutional, even if it burdens a sincere religious belief.[21]

In response to the *Smith* decision, Congress enacted RFRA in 1993.[22] RFRA restored the compelling interest test, stating:

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . [unless] it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[23]

Thus, if a plaintiff proves that the government substantially burdened the exercise of a person's sincere religious belief, RFRA shifts the burden of proof to the government to establish that its action furthers a compelling government interest using the least restrictive means. Significantly, RFRA does not define the word "person."[24]

B. For-Profit Corporations and First Amendment Jurisprudence

The enactment of the ACA and the HHS contraceptive mandate prompted the circuit courts of appeals to address a novel issue: whether for-profit corporations have First Amendment free exercise rights.[25] Although the Supreme Court had not addressed this issue until it granted certiorari in this case,[26] it has extended First Amendment free speech rights to for-profit corporations in the past.

One of the foundational cases establishing corporate free speech rights is *First National Bank of Boston v. Bellotti*.[27] The corporations in

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19. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, *as recognized in* Sossamon v. Texas, 131 S. Ct. 1651 (2011).

20. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403 (1963).

21. *Smith*, 494 U.S. at 878–79 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)) (internal quotation mark omitted).

22. *See* 42 U.S.C. § 2000bb (2012) (finding that RFRA's enactment responded to the *Smith* decision and intended "to restore the compelling interest test" in *Sherbert*); *see also* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1133 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

23. 42 U.S.C. § 2000bb-1(a)–(b) (2012).

24. *Id.* § 2000bb-2.

25. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 133 S. Ct. 641, 643 (Sotomayor, Circuit Justice 2012) ("This Court has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders alleging that the mandatory provision of certain employee benefits substantially burdens their exercise of religion.").

26. Sebelius v. Hobby Lobby Stores, Inc., 134 S. Ct. 678 (2013).

27. 435 U.S. 765, 767 (1978).

Bellotti wanted to publish their opposition to a proposed amendment to the state constitution imposing a heightened personal income tax.[28] However, a Massachusetts criminal statute prohibited corporations from making expenditures to influence a vote that did not materially affect the corporation's business.[29] The corporations challenged the statute, arguing that it impermissibly infringed upon their free speech rights.[30] The Supreme Court held that the Massachusetts criminal statute was unconstitutional.[31] The majority ruled:

> The court below framed the principal question in this case as whether and to what extent corporations have First Amendment rights. We believe that the court posed the wrong question. The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations "have" First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the challenged statute] abridges expression that the First Amendment was meant to protect. We hold that it does.[32]

Because the purpose of the Free Speech Clause is not dependent on the identity of the speaker, the Court held that a restriction on speech based solely on the speaker's corporate identity was unconstitutional.[33]

The Court acknowledged that the rights and liberties guaranteed by the Constitution are not automatically guaranteed to corporations.[34] To determine whether a particular constitutional guarantee applies to corporations, the Court created the "purely personal" test.[35] The Court first articulated this test in a footnote in *Bellotti*, stating that "[c]ertain 'purely personal' guarantees . . . are unavailable to corporations . . . . Whether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision."[36] In *Bellotti*, the Court held that corporations are entitled to free speech rights because the purpose of those rights is to afford the general "public access to discussion, debate, and the dissemination of information and ideas," as well as to encourage individual free speech.[37] Therefore, the identity of the speaker is irrele-

28. *Id.* at 769.
29. *Id.* at 767–68.
30. *Id.* at 770.
31. *Id.* at 776.
32. *Id.* at 775–76.
33. *Id.* at 777–78, 784–85.
34. *Id.* at 778 (stating that "corporations 'cannot claim for themselves the liberty which the Fourteenth Amendment guarantees'" (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925))).
35. *See id.* at 778 n.14.
36. *Id.*
37. *Id.* at 783.

vant to the purpose of free speech rights; in other words, the rights are not purely personal.

In 2010, the Supreme Court reaffirmed corporate free speech rights in *Citizens United v. Federal Election Commission.*[38] *Citizens United* centered on campaign and political expenditures.[39] The *Citizens United* court examined the reasoning in prior precedent, which held that because a corporate entity is not a natural person and has been granted "special advantages—such as limited liability [and] perpetual life," it has therefore given up its First Amendment rights.[40] However, relying on *Bellotti*, the *Citizens United* Court "rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"[41] The Court's decision in *Citizens United* played a significant role in the *Hobby Lobby* majority decision, as it formed the Tenth Circuit's basis for recognizing corporate free exercise rights under the First Amendment.[42] Like the *Citizens United* Court, the *Hobby Lobby* court rejected the government's argument that by using the corporate form, the corporate plaintiffs gave up First Amendment free exercise rights.[43]

C. Circuit Court Treatment of For-Profit Corporations' RFRA Challenges

Six circuit courts of appeals have considered for-profit corporations' RFRA challenges to the ACA contraceptive mandate, and so far the circuits are split.[44] The Third and Sixth Circuits have affirmed the trial courts' decisions to deny the plaintiffs' motions for a preliminary injunction, holding that the corporate and individual plaintiffs failed to demonstrate a likelihood of success on the merits.[45] However, the Seventh and Tenth Circuits reversed the district courts' denials and found that the corporate plaintiffs had demonstrated a likelihood of success on

38. Citizens United v. FEC, 558 U.S. 310, 342–43 (2010).

39. *See id.* at 318–20.

40. *Id.* at 350–51 (quoting Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 658–59 (1990)).

41. *Id.* at 343 (quoting *Bellotti*, 435 U.S. at 776).

42. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1135 (10th Cir. 2013) ("Because Hobby Lobby and Mardel express themselves for religious purposes, the First Amendment logic of *Citizens United*, where the Supreme Court has recognized a First Amendment right of for-profit corporations to express themselves for political purposes, applies as well. We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression." (citation omitted)), *cert. granted*, 134 S. Ct. 678 (2013).

43. *Id.* at 1135.

44. *See generally* Korte v. Sebelius, 735 F.3d 654, 659–60 (7th Cir. 2013); *Hobby Lobby*, 723 F.3d at 1120–21; Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 380–81 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013); Autocam Corp. v. Sebelius, 730 F.3d 618, 620 (6th Cir. 2013); Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1210 (D.C. Cir. 2013); Annex Med., Inc. v. Sebelius, No. 13–1118, 2013 WL 1276025, at *1, *3 (8th Cir. Feb. 1, 2013).

45. *See, e.g.*, *Conestoga*, 724 F.3d at 388–89; *Autocam*, 730 F.3d at 625–26, 628.

the merits.[46] Finally, the D.C. Circuit held that the corporate plaintiff failed to demonstrate a likelihood of success on its RFRA and free exercise claims.[47] However, the D.C. Circuit granted the injunction on the grounds that the contraceptive mandate substantially burdened the *individual* plaintiffs' religious beliefs.[48] Finally, the Eighth Circuit granted the injunction pending appeal without discussion.[49]

Conestoga Wood Specialties Corp. v. Secretary of United States Department of Health & Human Services[50] reached the opposite conclusion of *Hobby Lobby*. The Supreme Court granted certiorari to the *Conestoga* case and consolidated the appeal with *Hobby Lobby*.[51] Conestoga Wood Specialties Corp. (Conestoga) is a closely held corporation that manufactures wood cabinets and employs 950 employees.[52] The Hahn family owns all "of the voting shares of Conestoga."[53] "The Hahns practice the Mennonite religion" and believe that the "taking of life which includes anything that terminates a fertilized embryo is intrinsic evil and a sin against God . . . ."[54] The plaintiffs offered two theories on the corporation's entitlement to free exercise rights: (1) directly, based on *Citizens United* or (2) under a "pass through" theory, where the shareholders' beliefs pass through to the corporation.[55] The plaintiffs' pass through theory is based on the Ninth Circuit's decisions in *EEOC v. Townley Engineering & Manufacturing Co.*[56] and *Stormans, Inc. v. Selecky*,[57] which held "that for-profit corporations can assert the free exercise claims of their owners."[58]

The *Conestoga* court rejected both theories.[59] It determined that for-profit corporations are not entitled to free exercise protection because the right to free exercise of religion is a purely personal right and Free Exercise Clause jurisprudence has never recognized such a right for for-profit corporations.[60] The court distinguished the case from *Citizens United*.[61] It held that *Citizens United* was supported by a long line of case law, which affirmed that the right to free speech was not a purely personal right.[62]

46. *See, e.g.*, *Korte*, 735 F.3d at 682, 687; *Hobby Lobby*, 723 F.3d at 1121, 1147.
47. *See generally Gilardi*, 733 F.3d at 1215, 1224.
48. *Id.* at 1216, 1224.
49. *Annex Med.*, 2013 WL 1276025, at *3; O'Brien v. U.S. Health & Human Servs., No. 12-3357, 2012 U.S. App. LEXIS 26633, at *4 (8th Cir. Nov. 28, 2012).
50. 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).
51. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 134 S. Ct. 678 (2013).
52. *Conestoga*, 724 F.3d at 381.
53. *Id.*
54. *Id.* at 381–82 (internal quotation marks omitted).
55. *Id.* at 387.
56. 859 F.2d 610 (9th Cir. 1988).
57. 586 F.3d 1109 (9th Cir. 2009).
58. *Conestoga*, 724 F.3d at 386–87.
59. *Id.* at 387–88.
60. *Id.* at 384–85.
61. *Id.* at 384–86.
62. *Id.* at 383–84.

The court also pointed out that the Free Speech Clause and the Free Exercise Clause have always been interpreted independently.[63] Finally, the court rejected the plaintiffs' pass through theory, holding that the *Townley* and *Stormans* decisions disregarded "the very nature of the corporate form," which is a "distinct legal entity . . . from those of the natural individuals who" incorporated it.[64] The court could not find a reason to ignore that distinction.[65] Having rejected both the direct and pass through theories, the *Conestoga* court held that the plaintiffs failed to demonstrate a likelihood of success on the merits of their RFRA and free exercise claims.[66]

The Sixth Circuit adopted the *Conestoga* court's reasoning in *Autocam Corp. v. Sebelius*[67] and *Eden Foods, Inc. v. Sebelius*.[68] Autocam Corporation and Autocam Medical, LLC (collectively Autocam) are closely held for-profit corporations owned by the Kennedys, a Roman Catholic family.[69] Autocam manufactures products "for the automotive and medical industries."[70] Eden Foods, Inc. (Eden) is a natural foods corporation owned and operated by Michal Potter, also a Roman Catholic.[71] Both the individual family–owners and their corporations challenged the ACA contraceptive mandate.[72] In both cases, the Sixth Circuit held that the individual shareholder plaintiffs lacked standing to bring a RFRA claim due to the corporation's distinct legal identity.[73] The court further held that the corporate plaintiffs did not demonstrate a likelihood of success on the merits because, according to the court's statutory interpretation of RFRA, for-profit corporations are not persons under RFRA.[74]

The Seventh Circuit, on the other hand, held that for-profit corporations are persons under RFRA in the consolidated cases *Korte v. Sebelius*,[75] and *Grote v. Sebelius*.[76] K & L Contractors, a construction company owned by the Korte family, and Grote Industries, a vehicle safety manufacturing company owned by the Grote family, are closely held corporations.[77] Both families are Catholic and object to providing aborti-

63. *Id.* at 386.
64. *Id.* at 387 (internal quotation marks omitted).
65. *Id.* at 388.
66. *Id.* at 389.
67. 730 F.3d 618 (6th Cir. 2013).
68. Eden Foods, Inc. v. Sebelius, 733 F.3d 626, 632–33 (6th Cir. 2013); *Autocam*, 730 F.3d at 628.
69. *Autocam*, 730 F.3d at 620.
70. *Id.*
71. *Eden Foods*, 733 F.3d at 629.
72. *Id.* at 630; *Autocam*, 730 F.3d at 620.
73. *Eden Foods*, 733 F.3d at 632–33; *Autocam*, 730 F.3d at 622–23.
74. *Eden Foods*, 733 F.3d at 632; *Autocam*, 730 F.3d at 628.
75. 735 F.3d 654, 659, 682 (7th Cir. 2013).
76. Grote v. Sebelius, 708 F.3d 850, 852 (7th Cir. 2013) (granting injunction pending appeal and consolidating appeal with Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013)).
77. *Korte*, 735 F.3d at 662–63.

facient contraceptives based on their Catholic beliefs.[78] The Seventh Circuit held, "The government's proposed exclusion of secular, for-profit corporations finds no support in the text or relevant context of RFRA or any related statute."[79]

Finally, in *Gilardi v. U.S. Department of Health & Human Services*,[80] the D.C. Circuit added yet another potential solution to the for-profit corporation RFRA conundrum.[81] The court held that the secular, for-profit corporate plaintiffs, Freshway Foods and Freshway Logistics (collectively Freshway), did not have a free exercise right because the "'nature, history, and purpose' of the Free Exercise Clause . . . militat[es] against the discernment of such a right."[82] The court also refused to adopt the Ninth Circuit pass through theory, although it found the argument "logically and structurally appealing."[83] Yet, it did decide that the Gilardi brothers who own Freshway demonstrated a likelihood of success on their RFRA claim, and stated:

> If the companies have no claim to enforce—and as nonreligious corporations, they cannot engage in religious exercise—we are left with the obvious conclusion: the right belongs to the Gilardis, existing independently of any right of the Freshway companies. Thus, the Gilardis' injury—which arises therefrom—is "separate and distinct," providing us with an exception to the shareholder-standing rule.[84]

Freshway is the entity that is required to comply with the contraceptive mandate, not the Gilardis.[85] Therefore the direct injury, either financial or moral, is to the corporation.[86] It is unclear from the court's analysis how it makes the leap from an injury to Freshway to an injury to the Gilardis without addressing that Freshway and Gilardi are distinct legal entities.

II. *HOBBY LOBBY STORES, INC. V. SEBELIUS*

A. Facts and Procedural History

Hobby Lobby Stores, Inc. (Hobby Lobby) is a retail arts and crafts chain incorporated under Oklahoma law.[87] Hobby Lobby is a closely held S-corporation owned and operated by David and Barbara Green and their three children.[88] The Green family also owns and operates Mardel,

78. *Id.* at 662–64.
79. *Id.* at 679.
80. 733 F.3d 1208 (D.C. Cir. 2013).
81. *See id.* at 1212–16.
82. *Id.* at 1214.
83. *Id.* at 1214–15.
84. *Id.* at 1216.
85. *See id.* at 1210–11.
86. *See id.*
87. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1121–22 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013); Verified Complaint at 7, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013), (No. CIV-12-1000-HE).
88. *Hobby* Lobby, 723 F.3d at 1122.

Inc., a Christian bookstore chain.[89] Hobby Lobby has over 500 stores nationwide with about 13,000 full-time employees; Mardel has 35 stores nationwide with around 400 employees.[90]

Both Hobby Lobby and Mardel are operated according to express Christian principles.[91] Hobby Lobby's statement of purpose reads, "[H]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles."[92] Hobby Lobby and Mardel are both closed on Sundays, and "Hobby Lobby buys hundreds of full-page newspaper ads inviting people to 'know Jesus as Lord and Savior.'"[93] Mardel only sells Christian books and materials.[94] Hobby Lobby and Mardel are operated through a management trust, which requires each trustee to sign an agreement that "requires them to affirm the Green family statement of faith."[95] A principal tenet of the Green's faith is the belief that life begins at conception and that "it is immoral . . . to facilitate any act that causes the death of a human embryo."[96] Hobby Lobby and Mardel's current employment-based group health plan does not cover certain contraceptives, such as Plan B and Ella, which prevent a fertilized zygote from implanting in the uterine wall.[97]

One of the provisions of the ACA requires employment-based group health plans to provide preventative health services for women.[98] HHS adopted the recommendation of the Institute of Medicine to require such health plans to include twenty FDA-approved contraceptives.[99] This requirement has come to be known as the contraceptive-coverage requirement or the contraceptive mandate.[100] Four of these methods "can function by preventing the implantation of a fertilized egg."[101]

HHS has established exceptions to this contraceptive mandate for "religious employers," certain nonprofit organizations, "grandfathered" plans, and "businesses with fewer than fifty employees."[102] According to HHS regulations, an organization is a religious employer if it satisfies all four of the following criteria:

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89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* (internal quotation marks omitted).
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 1124–25.
98. *Id.* at 1122 (citing 42 U.S.C. § 300gg–13(a)(4) (2012); 29 U.S.C. § 1185d (2012)).
99. *Id.* at 1123.
100. *See id.* at 1123–24.
101. *Id.* at 1123; *see also id.* at 1123 n.3 ("There is an ongoing medical debate as to whether some of the contraceptive methods relevant to this case act by preventing implantation or fertilization." (emphasis omitted)).
102. *Id.* at 1123–24 (internal quotation marks omitted) (identifying the entities exempt from the contraceptive mandate).

> (1) The inculcation of religious values is the purpose of the organization.
>
> (2) The organization primarily employs persons who share the religious tenets of the organization.
>
> (3) The organization serves primarily persons who share the religious tenets of the organization.
>
> (4) The organization is a nonprofit organization as described in section 6033(a)(1) and section 6033(a)(3)(A)(i) or (iii) of the Internal Revenue Code . . . .[103]

If an organization's employment-based group health plan does not fall under one of the exemptions and fails to comply with the contraceptive mandate, the organization will be taxed "$100 for each day in the noncompliance period with respect to each individual to whom such failure relates."[104]

Hobby Lobby and Mardel do not qualify for any of the current HHS exemptions from the contraceptive mandate. As for-profit organizations, they cannot qualify as religious employers or for the other nonprofit-based exemptions.[105] They also do not "qualify for the 'grandfathered' status exemption because they elected not to maintain grandfathered status" before the contraceptive mandate was proposed.[106] Therefore, if the term "individual" in the regulation refers to each individual covered by a health plan, Hobby Lobby and Mardel's failure to provide the required contraceptive coverage for its 13,000 full-time employees would result in a $1.3 million dollar fine per day.[107]

Hobby Lobby, Mardel, and the Greens filed suit in the U.S. District Court for the District of Western Oklahoma and moved for a preliminary injunction, arguing that the HHS contraceptive mandate violated the Free Exercise Clause and RFRA.[108] The district court denied the motion for a preliminary injunction, holding that secular, for-profit corporations do not have constitutional free exercise rights[109] and are not persons under RFRA.[110] The plaintiffs then filed an application to the Tenth Circuit for an injunction pending appellate review, which the court denied.[111] Justice Sotomayor, sitting as the Circuit Justice for the Tenth Circuit, also de-

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103. 45 C.F.R. § 147.130(a)(1)(iv)(B) (2013).
104. 26 U.S.C. § 4980D (2012).
105. *Hobby Lobby*, 723 F.3d at 1124.
106. *Id.*
107. *Id.* at 1125.
108. *Id.*
109. Hobby Lobby Stores, Inc. v. Sebelius, 870 F. Supp. 2d 1278, 1287–88 (W.D. Okla. 2012), *rev'd*, 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).
110. *Id.* at 1291–92.
111. Hobby Lobby Stores, Inc. v. Sebelius, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012), *cert. denied*, 133 S. Ct. 641 (Sotomayor, Circuit Justice 2012).

nied the plaintiffs' application to the United States Supreme Court for an injunction pending appellate review because Hobby Lobby's claims did not meet the "indisputably clear" standard required for a Justice to grant the injunction.[112] Justice Sotomayor noted that "[t]his Court has not previously addressed similar RFRA or free exercise claims brought by closely held for-profit corporations and their controlling shareholders" and left the door open for a petition for certiorari following a final judgment.[113]

Following Justice Sotomayor's denial of an injunction pending appeal, the Tenth Circuit heard the *Hobby Lobby* appeal en banc.[114] The resulting decision covered a variety of complex issues. In addition to the majority opinion, there were three concurring opinions, one dissenting opinion, and one opinion concurring in part and dissenting in part.[115] This Comment addresses only how for-profit corporations exercise religion and whether the First Amendment, RFRA, or both protect such exercise. The remaining issues are beyond the scope of this Comment.

B. Tymkovich Majority Opinion: The Case for Corporate Religious Exercise

Judge Tymkovich, writing for the majority, focused on the merits of Hobby Lobby and Mardel's RFRA claim.[116] The primary issue was whether for-profit entities constituted *persons* capable of exercising religion.[117] The government argued that secular, for-profit entities are not persons entitled to RFRA protection because the RFRA term *person* carries forward a for-profit/nonprofit distinction from similar statutes, such as civil rights statutes and labor laws, and that this distinction is "rooted in the Free Exercise Clause."[118] Hobby Lobby countered that the plain language of the statute supports the inclusion of corporate entities.[119] It also asserted that the Supreme Court has already applied RFRA to some corporate entities, not just to individuals.[120]

The majority began by addressing the statutory interpretation of the word *person* in RFRA.[121] Because RFRA does not specifically define the

112. *Hobby Lobby*, 133 S. Ct. at 642–43 (quoting Wis. Right to Life, Inc. v. FEC, 542 U.S. 1305, 1306 (2004)) (internal quotation mark omitted).

113. *Id.* at 643.

114. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1120, 1120 n. * (10th Cir. 2013) (noting that Judge Jerome A. Holmes recused himself), *cert. granted*, 134 S. Ct. 678 (2013).

115. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1121–22 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

116. *See id.*

117. *Id.* at 1128.

118. *Id.* at 1128–29.

119. Reply Brief for Appellants, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114 (10th Cir. 2013) (No.12-6294), 2013 WL 1399593, at *18.

120. *Hobby Lobby*, 723 F.3d at 1129.

121. *Id.*

term, Judge Tymkovich began by looking at the Dictionary Act.[122] The Dictionary Act states, "[U]nless the context indicates otherwise . . . the word[] 'person' . . . include[s] corporations, companies, associations, . . . as well as individuals."[123] The majority asserted that, because the plain language of the statute includes corporations, it "could end the matter [t]here," especially because neither RFRA nor the Dictionary Act expresses a for-profit/nonprofit distinction.[124]

Although the majority asserted that it could end the discussion at the Dictionary Act and plain meaning of the statute, it continued to examine whether RFRA's legislative context, such as its legislative history and other statutes providing religious exemptions, indicated a different interpretation of the word *person*.[125] It decided that it did not.[126] The government pointed to similar statutes that only provide religious exemptions to nonprofit organizations, religious organizations, and religious employers.[127] The government argued that these statutes' exemptions indicate Congress's intent to limit religious exemptions to nonprofit, religious entities rather than for-profit entities, and that Congress "carried forward" this interpretation into the definition of *person* in RFRA.[128] The court refused to accept the government's argument, instead finding that the religious exemptions in similar statutes "show that Congress knows how to craft a corporate religious exemption, but chose not to do so in RFRA."[129] As a result, the court concluded that "when the exemptions are not present, it is not that they are 'carried forward' but rather that they do not apply."[130]

The court also rejected the government's argument that the case law from the time RFRA was drafted indicated that Congress intended to incorporate a for-profit/nonprofit distinction into the term *person*.[131] The government cited *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,[132] a Title VII case in which a nonprofit run by the Mormon Church fired employees who did not adhere to religious behavioral standards.[133] In *Amos*, the government argued that allowing religious discrimination for for-profit, nonreligious jobs would violate the Establishment Clause.[134] Thus, according to the government, there is a for-profit/nonprofit distinction in free exercise jurisprudence

122. *Id.*
123. 1 U.S.C. § 1 (2012).
124. *Hobby Lobby*, 723 F.3d at 1129.
125. *Id.* at 1129–30.
126. *Id.* at 1130.
127. *Id.*
128. *Id.* (internal quotation mark omitted).
129. *Id.*
130. *Id.*
131. *Id.* at 1131.
132. 483 U.S. 327 (1987).
133. *See Hobby Lobby*, 723 F.3d at 1131.
134. *Id.* (citing *Amos*, 483 U.S. at 331).

that denies protection to for-profit entities.[135] However, the *Amos* court found that the activities in question were not for-profit; therefore, the issue of whether for-profit entities could receive the protections of the Free Exercise Clause was still an open question.[136] Because the Supreme Court had not decided this issue when Congress drafted RFRA, the court reasoned that a for-profit/nonprofit distinction could not be implied in Congress's use of *person* in RFRA based on case law alone.[137] The court also found that the cases cited by the government indicated only that for-profit/nonprofit status is one relevant factor in determining whether RFRA applies but did not indicate that it was dispositive.[138] Furthermore, these cases were decided after RFRA was enacted; therefore, their for-profit/nonprofit distinctions could not have influenced Congress's intent in drafting RFRA.[139]

Having disposed with the statutory issue, Judge Tymkovich next addressed the First Amendment issue.[140] The majority began by noting that groups, as well as individuals, have rights under the First Amendment's Free Exercise Clause.[141] In support of this position, the majority cited the Supreme Court's decision in *Roberts v. United States Jaycees*,[142] which states: "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."[143] Thus, First Amendment protection extends not only to individuals; it also extends to the organizations or corporations they participate in to exercise their First Amendment rights.[144] The court also cited to *Citizens United*, which extended First Amendment protection to corporations.[145] Because the Supreme Court has extended Free Exercise Clause and First Amendment protection to associations and nonprofit corporations, "the Free Exercise Clause is *not* a '"purely personal" guarantee[] . . . unavailable to corporations and other organizations because the "his-

135. *Id.*

136. *Id.* (citing *Amos*, 483 U.S. at 337); *Amos*, 483 U.S. 345 n.6 (Brennan, J., concurring); *Amos*, 483 U.S. at 349 (O'Connor, J., concurring).

137. *Hobby Lobby*, 723 F.3d at 1132.

138. *Id.*

139. *Id.*

140. *Id.* at 1133.

141. *Id.*

142. 468 U.S. 609 (1984).

143. *Hobby Lobby*, 723 F.3d at 1133 (emphasis omitted) (citing *Roberts*, 468 U.S. at 622). The United States Jaycees is a nonprofit membership corporation whose purpose is to promote civic organizations for young men. *Roberts*, 468 U.S. at 612–13.

144. *See Roberts*, 468 U.S. at 622 ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

145. *Hobby Lobby*, 723 F.3d at 1133 (citing Citizens United v. FEC, 558 U.S. 310, 342–43 (2010)).

toric function" of the particular [constitutional] guarantee has been limited to the protection of individuals.'"[146]

Having established that free exercise jurisprudence extends free exercise rights to incorporated entities, the majority next addressed whether a corporation's for-profit/nonprofit status affects its free exercise rights.[147] Judge Tymkovich noted that the Free Exercise Clause protects more than religious beliefs; it also protects religiously motivated conduct, including religious expression.[148] Such religious conduct can be exercised by individuals and corporations alike, regardless of nonprofit status.[149] Although Hobby Lobby and Mardel are for-profit corporations, according to the majority they express themselves religiously by publishing hundreds of proselytizing ads.[150] The court concluded that:

> Because Hobby Lobby and Mardel express themselves for religious purposes, the First Amendment logic of *Citizens United*, where the Supreme Court has recognized a First Amendment right of for-profit corporations to express themselves for political purposes, applies as well. We see no reason the Supreme Court would recognize constitutional protection for a corporation's political expression but not its religious expression.[151]

Judge Tymkovich argued that the exercise of religion and the pursuit of profit are not mutually exclusive.[152] A person, such as a kosher butcher, may choose to incorporate to take advantage of limited liability protections or tax rates while still engaging in business practices informed by her religion.[153]

The court was also troubled by the notion of tying Free Exercise rights to a congressional definition of "nonprofit."[154] "What if," the majority hypothesized, "Congress eliminates the for-profit/non-profit distinction in tax law? Do for-profit corporations then *gain* Free Exercise rights? Or do non-profits *lose* Free Exercise rights?"[155] As a result, the majority rejected "such a bright-line rule" that extended free exercise rights only to religious organizations.[156]

Judge Tymkovich acknowledged that the holding of this case could potentially "raise difficult questions of how to determine the corpora-

146. *Id.* at 1133–34 (alterations in original) (omission in original) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978)).
147. *Id.* at 1134.
148. *Id.*
149. *Id.*
150. *Id.* at 1135.
151. *Id.* (citation omitted).
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* at 1136.

tion's sincerity of belief."[157] However, he declined to address those questions because the sincerity of Hobby Lobby's, Mardel's, and the Green's beliefs were not in dispute.[158] The Tenth Circuit held that the corporation's explicitly Christian mission, proselytizing activity, and adherence to Christian standards provided sufficient evidence that Hobby Lobby's and Mardel's religious beliefs were sincere, and therefore qualify for RFRA protection.[159] Thus, the majority explicitly avoided deciding what factors are necessary to determine the sincerity of a corporation's religious beliefs.[160]

C. Hartz Concurrence: An Examination of a Corporate Right to Exercise Religion[161]

Judge Hartz agreed with Judge Tymkovich that the Free Exercise Clause and RFRA protect for-profit corporations.[162] He outlined three characteristics of corporations that could weigh against corporations having free exercise rights: "(1) [the corporation] is for profit, (2) it has adopted a corporate form, and (3) it is a group activity."[163] He then asserted that none of these features disqualify corporations from First Amendment protection and free exercise rights.[164]

The first feature, profit-seeking, fails to disqualify for-profit corporations because the Supreme Court previously extended free exercise protection to individual profit-seekers in *Braunfeld v. Brown*[165] and *United States v. Lee*.[166] Even though profit-seeking may not be a religious exercise, those who seek profits may still be required by their religious convictions to participate in, or to refrain from, certain activities when operating their businesses.[167] Judge Hartz stated, "The Constitution does not require compartmentalization of the psyche, saying that one's religious persona can participate only in nonprofit activities."[168]

The second feature, use of the corporate form, also fails to disqualify for-profit corporations from free exercise protection. While the government may require special obligations from individuals who use the corporate form or place limitations on a corporation's constitutional

157. *See id.* at 1136–37.
158. *Id.* at 1137.
159. *Id.*
160. *Id.*
161. Because the scope of this Comment is limited to the issue of whether and how a for-profit corporation can exercise religion, I will only address the concurring opinions that discuss this issue. Therefore, the concurring opinions of Judge Gorsuch and Judge Bacharach are not discussed in this Comment.
162. *Id.* at 1147 (Hartz, J., concurring).
163. *Id.*
164. *Id.*
165. 366 U.S. 599 (1961).
166. United States v. Lee, 455 U.S. 252 (1982); *Hobby Lobby*, 723 F.3d at 1148 (Hartz, J., concurring) (citing *Braunfeld*, 366 U.S. at 601; *Lee*, 455 U.S. at 254).
167. *Hobby Lobby*, 723 F.3d at 1148 (Hartz, J., concurring).
168. *Id.*

rights, Judge Hartz argued that these obligations and limitations that the government imposes "must relate to use of the corporate form."[169] The use of the corporate form to limit personal financial liability has no connection to a corporation's decision to form its business practices around religious beliefs.[170] Furthermore, "First Amendment jurisprudence is based on the substance of the constitutional protections, not matters of form."[171] Thus, the use of the corporate form should not be dispositive of a corporation's claim for First Amendment protection.

Judge Hartz addressed the third feature of the corporate form, the "group-activity feature," and similarly concluded that this feature does not disqualify a corporation from free exercise protection.[172] One could argue that "group-activity" diminishes the constitutional right to free exercise because a group itself cannot "believe" and the group may not reflect each constituent's beliefs.[173] Judge Hartz responded by asserting that although organizations do not "have souls[,] . . . it does not follow that people must sacrifice their souls to engage in group activities through an organization."[174] He further asserts that the rights of an organization are distinct from rights of group members, because "one who acts through a group loses a measure of personal autonomy . . . . The group may say something that is anathema to one of its members or do something contrary to the religious faith of a member."[175] According to Judge Hartz, the religious speech or conduct only needs to represent an official position of the corporation to gain free exercise protections.[176] He reiterated his claim that "[o]ne who wants to have a prosperous business, but a business that still does nothing contrary to one's faith, can reasonably decide that the best way to accomplish this is to join with like-minded persons, perhaps as partners, perhaps as fellow shareholders."[177]

He dismissed the argument that for-profits are not entitled to free exercise protection because there is no precedent for the principle that for-profit corporations are persons under RFRA.[178] He pointed out that the Supreme Court has never ruled one way or the other on the issue; therefore, there is no precedent that for-profit corporations *do not* have the right to the free exercise of religion.[179]

Judge Hartz finally addressed two of dissenting Chief Judge Briscoe's concerns: (1) the ease with which a corporation can "avoid or take

169. *Id.*
170. *See id.*
171. *Id.*
172. *Id.*
173. *See id.* at 1148–49.
174. *Id.* at 1148.
175. *Id.* at 1149.
176. *Id.*
177. *Id.*
178. *Id.* at 1150.
179. *Id.*

advantage of . . . government rule[s] or requirement[s]" based on the "exercise of religion"[180] and (2) the fear that granting free exercise rights to for-profit corporations would "open[] the floodgates to RFRA litigation."[181] As to the first concern, Judge Hartz argued that a corporate plaintiff must prove that its religious belief is sincere in order to be protected by RFRA, and "sincerity questions with respect to corporations should not be unmanageable."[182] According to Judge Hartz, the court could determine the sincerity of the corporation's belief through factors such as (1) the consistency of the corporation's beliefs with its history and (2) the recognition of who has authority to speak and act for the entity.[183]

Addressing the dissent's second concern about opening the RFRA litigation floodgates, Judge Hartz countered, "[I]t makes no sense under RFRA to refuse to grant a merited exemption just because others may also seek it. How ironic if a burden on religious objectors can be justified because 'too many' objectors find a law repugnant."[184] He concluded that Congress rejected a similar argument expressed in *Smith* when it enacted RFRA.[185]

D. Briscoe Dissent: Lack of Evidence, Lack of Precedent, Lack of Right[186]

Chief Judge Briscoe's dissent focused on three deficiencies.[187] First, she argued that the plaintiffs presented insufficient evidence regarding how the corporate plaintiffs exercise religion.[188] Second, she asserted that the majority imposed the plaintiffs' burden of persuasion on the defendants.[189] Finally, she claimed that there is no precedent that supports the plaintiffs' RFRA claims or "the new class of corporations effectively recognized by the majority."[190]

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180. *Id.* at 1165 (Briscoe, C.J., concurring in part and dissenting in part) (internal quotation marks omitted).

181. *Id.* at 1174.

182. *Id.* at 1150 (Hartz, J., concurring).

183. *Id.*

184. *Id.*

185. *Id.* at 1150–51 (citing Emp't Div., v. Smith, 494 U.S. 872, 885, 888 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, *as recognized in* Sossamon v. Texas, 131 S. Ct. 1651 (2011)).

186. *Id.* at 1163 (Briscoe, C.J., concurring in part and dissenting in part). Chief Judge Briscoe agrees, along with every other judge, that the Anti-Injunction Act does not apply to the RFRA claims in this appeal. *Id.* at 1164. She dissents from the majority's opinion that the plaintiffs have demonstrated a substantial likelihood of success on its RFRA claim, and she would affirm the district court's denial of injunctive relief. *Id.* at 1163–64.

187. *Id.* at 1163.

188. *Id.*

189. *Id.*

190. *Id.*

At the beginning of her opinion, Chief Judge Briscoe pointed out that the evidentiary record on appeal was scant.[191] The "plaintiffs presented no evidence of any kind" during the preliminary injunction hearing, and at the time of the appeal the defendants had not even filed an answer to the complaint.[192] As a result, Chief Judge Briscoe asserted that the "plaintiffs presented no evidence attempting to demonstrate whether or how Hobby Lobby and Mardel hold religious beliefs, and whether or how these corporate plaintiffs . . . exercise religion."[193] Because the plaintiffs failed to meet their evidentiary burden, the district court correctly denied their motion for a preliminary injunction.[194] Chief Judge Briscoe was also concerned about how eager the majority was to reach the merits of the plaintiffs' claims when the evidentiary record was so deficient.[195]

Chief Judge Briscoe next addressed the merits of the corporate plaintiffs' RFRA claims, asserting that the majority made "a number of critical mistakes" in concluding that the corporate plaintiffs were persons within the meaning of RFRA.[196] Chief Judge Briscoe noted that "Hobby Lobby and Mardel are, in a nutshell, for-profit businesses focused on selling merchandise to consumers" rather than "faith-based compan[ies]" or organizations with "religious mission[s]."[197] Although Hobby Lobby's statement of purpose reflects a commitment to Christian religious principles, Chief Judge Briscoe concluded that such a purpose does not alter the companies' for-profit status or place them in a "unique class for purposes of RFRA."[198] By labeling Hobby Lobby and Mardel "'faith-based companies' and businesses with a 'religious mission,'" the dissent argued that the majority had created an unprecedented "new legal category of for-profit corporation[s]."[199]

The dissent next criticized the majority's analysis of the definition of *person* under RFRA, claiming that RFRA's legislative history does not support a definition that includes for-profit entities.[200] The legislative history indicates that Congress enacted RFRA to restore the compelling interest test for free exercise challenges, the test that the Supreme Court overruled in *Smith*.[201] However, Congress did not intend to expand the scope of free exercise rights.[202] As a result, the Free Exercise Clause case law in existence at the time RFRA was passed serves as the relevant con-

191. *Id.* at 1164.
192. *Id.*
193. *Id.*
194. *See id.*
195. *Id.* at 1164–65.
196. *Id.* at 1165.
197. *Id.* (first alteration in original) (quoting *id.* at 1122, 1128 (majority opinion)).
198. *Id.* at 1165–66.
199. *Id.* at 1166.
200. *Id.* at 1166–67.
201. *Id.* at 1167.
202. *Id.*

text for interpreting the meaning of *person* in RFRA.[203] Chief Judge Briscoe asserted that the plaintiffs failed to provide pre-RFRA precedent to support their claim that RFRA covers for-profit corporate entities "[n]ot because they have overlooked precedent . . . [b]ut rather because none exists."[204] Because the Supreme Court has never addressed whether for-profit corporations have free exercise rights, Chief Judge Briscoe concluded that the Supreme Court considers such rights as confined to religious non-profits and individual practitioners.[205]

Having dispensed with the majority's RFRA analysis, Chief Judge Briscoe next turned to its Free Exercise Clause analysis.[206] She first argued that there is no precedent to support the conclusion that for-profit entities can exercise religion separate from the individuals who incorporate them.[207] A basic tenet of corporate law is that the corporation is a new legal entity, distinctly separate from the natural individuals who create it.[208] Chief Judge Briscoe claimed that the majority had impermissibly conflated the religious beliefs of the Green family with the religious beliefs of the corporations[209] resulting in "a radical revision of First Amendment law, as well as the law of corporations."[210] She pointed out that the majority had failed to answer several key questions in its analysis, such as "whether corporations can 'believe,'" how courts should determine what a for-profit corporation's religious beliefs are, and how the rights associated with such beliefs are distinct from the corporation's constituents' rights.[211] As a result, the majority had "opened the floodgates to RFRA litigation," and "entangle[d] the government in the impermissible business of determining whether for-profit corporations are sufficiently 'religious' to be entitled to protection under RFRA."[212]

E. Matheson Dissent[213]

Judge Matheson, while agreeing with Chief Judge Briscoe that the corporate plaintiffs did not meet their burden of showing a likelihood of success on their RFRA claim, declined to conclude that RFRA and Free Exercise Clause cannot apply "to any for-profit corporation[s]."[214] He

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203. *Id.*
204. *Id.* at 1167–68.
205. *Id.* at 1168.
206. *Id.* at 1170.
207. *Id.*
208. *Id.* at 1171 (citing Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001)).
209. *Id.* at 1173–75.
210. *Id.* at 1172.
211. *Id.* at 1174.
212. *Id.* at 1174–75.
213. *Id.* at 1178 (Matheson, J., concurring in part and dissenting in part). Judge Matheson agrees with the majority that Hobby Lobby and Mardel have Article III standing. *Id.* at 1121 (majority opinion). He further concludes that the Greens have standing. *Id.* He also "reaches the merits of the plaintiffs'" Free Exercise Claim, concluding that it does not merit "preliminary injunctive relief." *Id.*
214. *Id.* at 1179 (Matheson, J., concurring in part and dissenting in part).

was reluctant to "attempt a final answer on such a novel and significant question until [the Court had] to" and simply stated that "the plaintiffs have not met their burden at this point."[215]

According to Judge Matheson, "[t]he majority and the plaintiffs . . . ignor[ed] the corporate form and imput[ed] the religious beliefs of the Greens to the corporations."[216] He acknowledged that courts may "'disregard the corporate form' or 'pierce the corporate veil'" under limited circumstances even though corporations and their constituents are distinct entities.[217] However, courts only pierce the corporate veil "reluctantly and cautiously,"[218] and they "require evidence" to do so but "plaintiffs have presented none."[219] He made no judgment regarding the success of such an argument in the future.[220]

III. PEERING INTO THE CORPORATE SOUL: HOW CORPORATIONS EXERCISE RELIGION

A. For-Profit Corporations Should Not Be Per Se Excluded from RFRA and Free Exercise Clause Protections

The Tenth Circuit's holding that Hobby Lobby and Mardel demonstrated a likelihood of success on their RFRA and Free Exercise Clause claims was the correct result for two reasons. First, the question of whether for-profit corporations can exercise religion has never been decided by the Supreme Court; therefore, a lack of precedent directly supporting free exercise protection of a for-profit corporation does not indicate that such rights do not extend to for-profits.[221] Second, the right to free exercise of religion is not a purely personal constitutional right, and therefore it extends to both corporate entities and natural persons.[222]

Chief Judge Briscoe's dissent in *Hobby Lobby*, as well as the majority opinions in *Conestoga* and *Autocam*, found the lack of precedent persuasive proof that for-profit corporations do not have free exercise rights.[223] However, the Supreme Court has specifically left open the issue

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215. *Id.*
216. *Id.* at 1181–82.
217. *Id.* at 1182 (quoting Floyd v. IRS, 151 F.3d 1295, 1298 (10th Cir. 1998)).
218. *Id.* (quoting Nat'l Labor Relations Bd. v. Greater Kan. City Roofing, 2 F.3d 1047, 1051 (10th Cir. 1993)) (internal quotation mark omitted).
219. *Id.* at 1183.
220. *Id.*
221. *See id.* at 1133–35 (majority opinion).
222. *See id.*
223. *See id.* at 1168–69 (Briscoe, C.J., concurring in part and dissenting in part) ("[D]uring the 200-year span between the adoption of the First Amendment and RFRA's passage, the Supreme Court consistently treated free exercise rights as confined to individuals and non-profit religious organizations."); Autocam Corp. v. Sebelius, 730 F.3d 618, 626 (6th Cir. 2013) ("While the Supreme Court has recognized the rights of sole proprietors under the Free Exercise Clause during this period, it has never recognized similar rights on behalf of corporations pursuing secular ends for profit."); Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 384–85 (3d Cir. 2013) ("[W]e are not aware of any case preceding the commencement of

of whether for-profit activity can constitute a protectable exercise of religion.[224] An issue that the Court has left open is not the same as an issue that has no precedent to support it.

Chief Judge Briscoe's dissent specifically highlighted the dearth of precedent "during the 200-year span between the adoption of the First Amendment and RFRA's passage" supporting the concept that for-profits can exercise religion.[225] However, there is a similar dearth of precedent explicitly denying for-profit free exercise rights. Even though the courts have not addressed the issues of for-profit religious activity, corporations and other for-profit entities have historically pursued public, social, or religious activities beyond profit-making.[226] As early as the development of Roman *societates*, organizations formed to share the burden of guaranteeing taxes collected for public purposes, "bestowing legal personality on the corporation has been understood to go hand-in-hand with rendering corporations accountable for the fulfillment of social purposes."[227] During the Vietnam War era, the corporate social responsibility (CSR) movement gained traction as reformers "sought to make the corporation more responsible to other constituencies [besides shareholders]" and address broader social issues.[228] Religion, as well as social issues, has also factored in to for-profit activity. Investors who wish to invest their money in accordance with their religion can invest in specifically faith-based mutual or hedge funds, such as LKCM Aquinas Funds and Ava Maria Funds (Catholic), Amana Mutual Funds (Islamic), and Guidestone Funds (Protestant), which invest in companies according to religious principles.[229] For example, these mutual funds may not invest in "sin stocks," such as "alcohol, pornography[,] or gambling."[230] These mutual or hedge funds, as corporations, observe and apply religious prin-

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litigation about the [m]andate[] in which a for-profit, secular corporation was itself found to have free exercise rights."), *cert. granted*, 134 S. Ct. 678 (2013).

224. *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 345 n.6 (1987) (Brennan, J., concurring) ("It is . . . conceivable that some for-profit activities could have a religious character."); *id.* at 349 (O'Connor, J., concurring) ("[U]nder the holding of the Court, . . . the question of the constitutionality of the [Title VII section] as applied to for-profit activities of religious organizations remains open.").

225. *Hobby Lobby*, 723 F.3d at 1168 (Briscoe, C.J., concurring in part and dissenting in part).

226. *See, e.g.*, Lyman Johnson, *Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood*, 35 SEATTLE U. L. REV. 1135, 1144–45 (2012) ("Prior to the nineteenth century . . . many corporations were charged with carrying out public-serving functions, but this was not a requirement of business more generally. This public-service dimension seems not to have been an express legal prerequisite to corporate formation but instead reflected in practice a shared belief about the proper focus of corporate activity." (footnote omitted)).

227. MICHAEL KERR ET AL., CORPORATE SOCIAL RESPONSIBILITY: A LEGAL ANALYSIS 63 (Chip Pitts ed., 2009).

228. Jerome J. Shestack, *Corporate Social Responsibility in a Changing Corporate World*, *in* CORPORATE SOCIAL RESPONSIBILITY: THE CORPORATE GOVERNANCE OF THE 21ST CENTURY 97, 99 (Ramon Mullerat ed., 2005).

229. Lisa Smith, *A Guide to Faith-Based Investing*, INVESTOPEDIA (Feb. 29, 2012), http://www.investopedia.com/articles/stocks/12/investing-and-faith.asp.

230. *Id.*

ciples in deciding where to invest their client's funds.[231] In doing so, they arguably are exercising religion. According to Lake Lambert III in his book, *Spirituality, Inc.*, during the 1990s:

> [The traditional] "firewall" between spirituality and business . . . was a barrier that was breaking down as both individuals and organizations undergo a spiritual awakening. Individuals are seeking to bring their whole selves to the workplace, including their spirituality, and businesses today are dependent upon the creativity that only "consciousness" and spirituality can provide.[232]

There has also been a particularly explicit effort among evangelical Christians "to align business practices with Christian principles" and create "Christian companies."[233] In 1991, seventy-three percent of companies that were members of an organization called Fellowship of Companies for Christ reported that they sought "to proselytize customers."[234] Because proselytizing is a form of religious exercise, it follows that for-profit corporations can, and to some extent do, exercise religion. The majority in *Hobby Lobby* pointed out that Hobby Lobby and Mardel engage in such proselytizing activity.[235]

Because for-profit corporations can, at least to a certain extent, exercise religion, the next question is whether the Constitution extends free exercise protection to for-profit corporations. In *Conestoga*, the Third Circuit held that corporations, although entitled to some constitutional rights, are not entitled to constitutional rights that are "purely personal" based on the "historic function" of the right as described by the Supreme Court in a footnote in *Bellotti*.[236] The *Conestoga* court relied on the lack of precedent as support for the proposition that the historic function of the Free Exercise Clause does not entitle for-profit corporations to its protection.[237] This argument misinterprets the reasoning of *Bellotti*, as well as the history surrounding corporate constitutional rights.

While the Third Circuit focused only on the *Bellotti* footnote excluding corporations from the protection of purely personal rights, the main text of the majority opinion in *Bellotti* illuminates the correct context of corporate constitutional rights. The *Bellotti* Court reasoned, "The Constitution often protects interests broader than those of the party seek-

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231. *Id.*

232. LAKE LAMBERT III, SPIRITUALITY, INC.: RELIGION IN THE AMERICAN WORKPLACE 2 (2009).

233. *Id.* at 54.

234. *Id.* at 54–55 (citing Nabil A. Ibrahim et al., *Characteristics and Practices of "Christian-Based" Companies*, 10 J. BUS. ETHICS 123, 128 (1991)).

235. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1135 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

236. Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs., 724 F.3d 377, 383 (3d Cir. 2013) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 778 n.14 (1978)), *cert. granted*, 134 S. Ct. 678 (2013).

237. *Id.* at 384–85.

ing their vindication. The First Amendment, in particular, serves significant societal interests. . . . If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech."[238] The appellee's argument in *Bellotti* seems to parallel the government's in *Hobby Lobby*.[239] The government in *Hobby Lobby* argued that free exercise rights should only extend to explicitly religious entities, such as churches or religious nonprofit organizations, just as the government in *Bellotti* argued that full free speech rights should only extend to explicitly speech-related entities, such as the press.[240] Yet the *Bellotti* Court rejected this argument.[241] It emphasized that although the press has a "special and constitutionally recognized role," the press "does not have a monopoly on either the First Amendment or the ability to enlighten."[242] It follows that, although churches and religious nonprofit organizations have a special, constitutionally recognized role in free exercise jurisprudence, those entities do not have a monopoly on the exercise of religion or the protection of the First Amendment.

Despite this parallel, one could distinguish *Bellotti* on the grounds that, although a long line of case law demonstrates that the press does not have a monopoly on corporate free speech, case law is silent on for-profit, corporate religious exercise rights. One could argue that this lack of precedent demonstrates that the rights do not exist. However, this argument has been discussed in detail and found to be insufficient.[243]

Bellotti also raised the following concern:

> If a legislature may direct business corporations to "stick to business," it also may limit other corporations—religious, charitable, or civic—to their respective "business" when addressing the public. Such power in government to channel the expression of views is unacceptable under the First Amendment.[244]

Drawing the parallel to the case of free exercise rights, allowing the legislative or executive branch to limit free exercise rights only to natural persons, churches, or religious nonprofit organizations also constitutes an impermissible channeling of religious exercise.

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238. *Bellotti*, 435 U.S. at 776–77.

239. *Compare id.* at 781–83 ("[A]pellee suggests that First Amendment rights generally have been afforded only to corporations engaged in the communications business or through which individuals express themselves . . . . But the press does not have a monopoly on either the First Amendment or the ability to enlighten."), *with Hobby Lobby*, 723 F.3d at 1135–36 ("We are also troubled—as we believe Congress would be—by the notion that Free Exercise rights turn on Congress's definition of 'non-profit.' What if Congress eliminates the for-profit/non-profit distinction in tax law? Do for-profit corporations then *gain* Free Exercise rights? Or do non-profits *lose* Free Exercise rights?").

240. *Compare Bellotti*, 435 U.S. at 781, *with Hobby Lobby*, 723 F.3d at 1136.

241. *Bellotti*, 435 U.S. at 781–84.

242. *Id.* at 781–82.

243. *See supra* pp. 21–22.

244. *Bellotti*, 435 U.S. at 785.

In contrast to the Third Circuit's assertion that free exercise rights are purely personal, *Hobby Lobby* pointed out that the Supreme Court has recognized the free exercise rights of groups, associations, and corporations. The Supreme Court has held that "[a]n individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."[245] One could argue that such freedoms are only afforded to group efforts insofar as they promote protected individual freedoms. Because the primary reason corporations engage in "group effort" is to pursue profit, not to exercise religion, one could argue that they are not entitled to Free Exercise Clause protection. However, while pursuing profit may be the primary aim of a corporation, it need not be its only aim. This is especially true if the religious activity and the pursuit of profit align. For example, if a kosher butcher's primary market is a religious community,[246] it is possible that adherence to kosher practices results both from sincere religious conviction and the desire to run a prosperous business. The exercise of religious belief need only be sincere, and the First Amendment will protect it whether it occurs individually or as part of a group.

The Tenth Circuit also observed that the Supreme Court has recognized individuals' exercise of religion through their for-profit businesses.[247] In *Lee*, the Court recognized that the requirement for an Amish employer to pay Social Security taxes violated the employer's religious belief, although the Court found that the requirement furthered a compelling government interest.[248] Similarly, *Braunfeld* addressed a free exercise claim brought by Orthodox Jewish merchants challenging the state's Sunday closing laws.[249] The Court held that the law's indirect burden on the merchants' religious exercise was not substantial enough to invalidate the laws.[250] Although both cases were ultimately decided in favor of the government,[251] the cases were not decided based on the profit-seeking aspect of the plaintiffs' activities and seem to imply that individuals can exercise religion in the course of for-profit activity.[252]

245. Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

246. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1135 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

247. *Id.* at 1134.

248. United States v. Lee, 455 U.S. 252, 257–59 (1982).

249. Braunfeld v. Brown, 366 U.S. 599, 600–01 (1961).

250. *Id.* at 605–06.

251. *Lee*, 455 U.S. at 260–61; *Braunfeld*, 366 U.S at 609–10.

252. The *Braunfeld* Court never addressed whether the burdened religious exercise was that of the merchants' businesses or the individual owners. In fact, it never identified whether the merchants had incorporated. It is possible they operated as sole proprietors or in general partnerships. Either way, the Court treated the burden on the businesses and the burden on the owners as one and the same. *See Braunfeld*, 366 U.S. at 601.

The *Hobby Lobby* court reasoned that if "individuals may incorporate for religious purposes and keep their Free Exercise rights, and unincorporated individuals may pursue profit while keeping their Free Exercise rights," then for-profit activity and religious exercise cannot be considered mutually exclusive.[253] To decide otherwise could lead to potentially bizarre results. Adopting the majority's example of the kosher butcher: a butcher operating a for-profit business as a sole proprietor, a nonprofit promoting kosher butchering practices, or a synagogue selling kosher meats could all receive free exercise and RFRA protection. However, an incorporated butcher who relies on the same kosher practices, or, as an extreme example, a large corporation similar to Hebrew National, would not receive protection for the same religious activity based on the same religious beliefs simply because it is a corporation. The determination would turn on the identity of the believer rather than on the sincerity of the belief or the burden on the religious exercise.

The majority was also troubled by the idea that if they followed the government's reasoning that only nonprofit religious organizations are entitled to free exercise protection, then Congress's definition of "nonprofit" would determine an entity's free exercise rights.[254] For example, the majority hypothesized that if the government decided to eliminate "the for-profit/nonprofit distinction in tax law," then entities would arbitrarily gain or lose free exercise rights.[255]

The Free Exercise Clause protects religiously motivated conduct, both of individuals and of corporations and organizations alike, from impermissible government intrusion.[256] Allowing the government to decide which individuals and entities are entitled to protection would undermine the purpose of the right. This was the Court's reasoning in *Bellotti*.[257] Furthermore, the right to exercise religion should not be confined to the church, the home, or the religious organization. In *Lee* and *Braunfeld*, the Court addressed situations where individuals took their religious beliefs to the workplace.[258] Yet the cases were not decided based on the relationship between the religious belief and business activity; they were decided based on compelling government interests or the nature of the burden.[259] As the *Korte* court reasoned, if the for-profit nature of the activity precluded free exercise protection, the Court would have explicitly

253. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1134 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

254. *Id.* at 1135.

255. *Id.*

256. *See* BLUM ET AL., *supra* note 16, § 443.

257. *See* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978).

258. *See* United States v. Lee, 455 U.S. 252, 254 (1982); Braunfeld v. Brown, 366 U.S. 599, 601 (1961).

259. *See Lee*, 455 U.S. at 258–59 (holding that mandatory enforcement of social security system was a compelling governmental interest); *Braunfeld*, 366 U.S. at 605–06 (holding that, because Sunday closing law did not make religious conduct unlawful, the indirect financial burden was not substantial enough to merit free exercise protection).

said so.[260] However, "[i]t did not."[261] For these reasons, as well as those discussed above, for-profit corporations should not be per se excluded from free exercise protection.

B. How For-Profit Corporations Exercise Religion: A Proposed Test

Although the *Hobby Lobby* court correctly held that for-profit corporations can exercise religion and receive protection under RFRA and the Free Exercise Clause, the court was not as clear as it should have been in distinguishing between the religious exercise rights of the corporation and that of its owners. Both the Tenth Circuit and other circuit courts deciding similar cases have confused the line between the religious beliefs and activities of the corporation and that of the corporation's constituents.[262] One of the fundamental principles of corporate law is that a corporation is "a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs."[263] An individual or group of individuals may choose to incorporate to gain the legal advantages of the corporate form such as limited liability and perpetual existence.[264] However, the individual who incorporates also gives up certain legal rights and takes on additional legal obligations.[265] For example, directors and officers of corporations take on fiduciary duties such as the duty of loyalty and the duty of care.[266] A shareholder relinquishes, among other rights, the right to "direct legal action to redress an injury to him as primary stockholder in the business."[267]

Yet, while individuals may give up certain legal rights when they choose to incorporate, those individuals, acting as the corporation's directors and officers, still retain a vast amount of control over the purposes of the corporations and how it will operate.[268] Although it is a distinct legal entity, a corporation can only act through its duly authorized agents.[269] The board of directors of a corporation sets the overall goals

260. Korte v. Sebelius, 735 F.3d 654, 680 (7th Cir. 2013).

261. *Id.*

262. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1134–35, 1137 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

263. Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 163 (2001).

264. *See, e.g.*, Conestoga Wood Specialties Corp. v. Sec'y of the U.S. Dep't of Health & Human Servs., 724 F.3d 377, 388 (3d Cir. 2013) (listing limited liability as one of the advantages of the corporate form), *cert. granted*, 134 S. Ct. 678 (2013); Tr. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819) (discussing how perpetual existence is one of the "most important" objectives of a corporation).

265. *See, e.g.*, JAMES D. COX & THOMAS LEE HAZEN, 1 TREATISE ON THE LAW OF CORPORATIONS § 7:3 (3d ed. 2013).

266. *See, e.g.*, JAMES D. COX & THOMAS LEE HAZEN, 2 TREATISE ON THE LAW OF CORPORATIONS §§ 10:1, :11 (3d ed. 2013).

267. Kush v. Am. States Ins. Co., 853 F.2d 1380, 1384 (7th Cir. 1988).

268. *See, e.g.*, COX & HAZEN, *supra* note 266, § 9:5; *see also* COX & HAZEN, *supra* note 265, § 8:2.

269. *E.g.*, COX & HAZEN, *supra* note 265, § 8:1.

and objectives of the corporation.[270] The officers implement those goals and objectives and oversee the corporation's daily operations.[271] Furthermore, a corporation is governed by its articles of incorporations, bylaws, and board resolutions, which define the powers and limitations of its constituents and, in many cases, the corporation's purpose for existence.[272] These documents allow the incorporators and the board of directors to determine the purpose of the corporation and dictate its overall operations.[273] Furthermore, a corporation can be formed for almost any lawful purpose.[274] A corporation can be formed as a tire manufacturer, a grocery store, a school, a church, a restaurant, a homeless shelter, a hospital, an arts and crafts store, or for hundreds of other purposes as long as those purposes are lawful.

Because a corporation's duly authorized constituents act on the corporation's behalf and play a significant role in determining the purpose of the corporation,[275] the constituents' views and goals can be reflected in the organization and management of the corporation. The line between the corporation and its constituents becomes even thinner in closely held corporations such as Hobby Lobby and Mardel where the shareholders, board of directors, and officers are essentially the same people.[276] In some situations, a single person may serve as the sole shareholder, director, and officer of a corporation.[277]

A major obstacle to the validity of corporate religious exercise and CSR as a whole is the theory of shareholder wealth maximization articulated in *Dodge v. Ford Motor Co.*,[278] which asserts:

> A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself . . . .[279]

This theory limits directors and officers to making decisions based primarily on the decision's impact on maximizing profits and shareholder wealth. However, thirty-three states have a version of "constituency statutes," which permit directors to consider interests other than the interests

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270. *E.g.*, COX & HAZEN, *supra* note 266, § 9:5.
271. *E.g.*, COX & HAZEN, *supra* note 265, § 8:2.
272. *See id.* §§ 4:1, :12.
273. *See id.* § 4:1.
274. *See id.*
275. *E.g.*, COX & HAZEN, *supra* note 266, § 9.5.
276. *See* Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1122 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).
277. *See, e.g.*, Eden Foods, Inc. v. Sebelius, 733 F.3d 626, 629 (6th Cir. 2013) (identifying Michael Potter as "the founder, chairperson, president, and sole shareholder of Eden Foods, Inc.").
278. 170 N.W. 668 (Mich. 1919).
279. *Eden Foods*, 733 F.3d at 684.

of its shareholders when making decisions for the corporation.[280] Directors can make those decisions so long as those interests are what they reasonably believe are in the best interest of the company.[281] Although "permissive constituency statutes only create the option (and not the requirement) for directors to consider interests of constituencies other than shareholders," they open the door for directors and officers to consider interests such as societal interests, employee interests, and, for the purposes of this comment, religious interests.[282]

The Tenth Circuit and other circuit courts have muddied the waters by failing to adequately distinguish between the religious beliefs and activity of the corporate entity and the beliefs and exercise of its constituents. By doing so, the courts have sidestepped the foundational corporate law doctrine that a corporate entity is separate and distinct from its constituents. The majority opinion in *Hobby Lobby* frequently referred to religious *individuals* taking advantage of the corporate form yet still retaining their religious beliefs.[283] For example, the *Hobby Lobby* court used the example of an individual kosher butcher who wishes to incorporate to take advantage of the limited liability of the corporate form.[284] The court feared that, if the butcher incorporated, the individual butcher would lose his free exercise protections simply because he incorporated.[285] It did not address how Kosher Butcher, Inc. could exercise religion separately and distinctly from the individual.

If courts are going to recognize free exercise rights for corporations and still comply with the fundamentals of corporate law, then it is imperative to identify the *corporation's* religious beliefs and how it exercises religion. It is not enough to impute an individual constituent's beliefs to

280. *See* ARIZ. REV. STAT. ANN. § 10-2702 (2013); CONN. GEN. STAT. § 33-756(d) (2014); FLA. STAT. § 607.0830(3) (2013); GA. CODE ANN. § 14-2-202(b)(5) (2013); HAW. REV. STAT. § 414-221(b) (2013); IDAHO CODE ANN. § 30-1602 (2013); 805 ILL. COMP. STAT. 5/8.85 (2013); IND. CODE § 23-1-35-1(d) (2013); IOWA CODE § 490.1108A (2013); KY. REV. STAT. ANN. § 271B.12-210(4) (2013); LA. REV. STAT. ANN. § 12:92(G) (2013); ME. REV. STAT. tit. 13-C, § 831 (2013); MD. CODE ANN., CORPS. & ASS'NS § 2-104(b)(9) (West 2013); MASS. GEN. LAWS ch. 156B, § 65 (2013); MINN. STAT. § 302A.251(5) (2013); MISS. CODE ANN. § 79-4-8.30 (2013); MO. REV. STAT. § 351.347 (2013); NEB. REV. STAT. § 21-2432(2) (2013); NEV. REV. STAT. § 78.138(4) (2013); N.J. STAT. ANN. § 14A:6-1(2) (2013); N.M. STAT. ANN. § 53-11-35(D) (2013); N.Y. BUS. CORP. LAW § 717(b) (McKinney 2014); N.D. CENT. CODE § 10-19.1-50(6) (2013); OHIO REV. CODE ANN. § 1701.59(F) (West 2013); OR. REV. STAT. § 60.357(5) (2013); 15 PA. CONS. STAT. § 1715(a) (2013); R.I. GEN. LAWS § 7-5.2-8 (2013); S.D. CODIFIED LAWS § 47-33-4(1) (2013); TENN. CODE ANN. § 48-103-204 (2013); VT. STAT. ANN. tit. 11A, § 8.30(a) (2013); VA. CODE ANN. § 13.1-727.1 (2013); WIS. STAT. § 180.0827 (2013); WYO. STAT. ANN. § 17-16-830(g) (2013).

281. Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 26–27 (1992).

282. WILLIAM H. CLARK, JR. ET AL., THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC 10 (Jan. 18, 2013), *available at* http://benefitcorp.net/storage/documents/Benecit_Corporation_White_Paper_1_18_2013.pdf.

283. *See, e.g.*, Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1135 (10th Cir. 2013), *cert. granted*, 134 S. Ct. 678 (2013).

284. *Id.*

285. *Id.*

the corporation; the corporation itself must demonstrate religious exercise to gain First Amendment and RFRA protection. There are a few factors, grounded in basic corporate law, which can aid courts in determining the religious beliefs and actions of the corporate entity. In other words, these factors help identify how a corporation exercises religion. The first set of factors focuses on the organizational aspects of the corporation; the latter focuses on the operational aspects.[286] These factors are not exclusive, and they can be evaluated on a sliding scale.

The organizational factors include looking at the corporation's articles of incorporation or organization, bylaws, and board resolutions. Documents such as articles of incorporation are already utilized in other areas of the law to define the purpose of an organization for tax or regulatory reasons.[287] Furthermore, they provide a relatively straightforward mechanism for the incorporators to impute their religious beliefs to the entity while still adhering to the formalities of corporate law. The articles of incorporation, bylaws, or board resolutions could authorize or even mandate that the directors and officers consider religion when making decisions for the entity. For example, Hobby Lobby's purpose statement, "[h]onoring the Lord in all we do by operating the company in a manner consistent with Biblical principles," directs the company's constituents to operate according to religious principles.[288]

Particular corporate forms also may be a factor in determining how a corporation exercises religion.[289] For example, nineteen states and the District of Columbia have passed legislation creating a new class of corporations called "benefit corporations."[290] Benefit corporations were created to "address the unique needs of for-profit mission-driven business-

286. This test is meant to reflect the broad strokes of the organizational and operational test set out in the Internal Revenue Code for 501(c)(3) organizations. *See* 26 C.F.R. § 1.501(c)(3)–1 (2014). While the 501(c)(3) test focuses on private inurement and exclusive exempt purposes, this test focuses more on identifying the religious purpose of a for-profit organization that empowers it to exercise religion.

287. *See, e.g.*, *id.* § 1.501(c)(3)–1 (2014); COX & HAZEN, *supra* note 265, § 4:1.

288. *Hobby Lobby*, 723 F.3d at 1122 (alteration in original).

289. Some courts have considered particular corporate forms in their analyses already, albeit without much discussion on why the distinctions matter. *See id.* at 1136–37 ("The government nonetheless raises the specter of future cases in which, for example, a large publicly traded corporation tries to assert religious rights . . . . But that is not an issue here. Hobby Lobby and Mardel are not publicly traded corporations; they are closely held family businesses with an explicit Christian mission as defined in their governing principles. . . . It is hard to compare them to a large, publicly traded corporation, and the difference seems obvious."). Furthermore, in a concurring opinion to *Gilardi*, Judge Randolph "emphasize[d] the importance of the Freshway Corporations' election to be taxed" as an S-corporation. Gilardi v. U.S. Dep't of Health & Human Servs., 733 F.3d 1208, 1225 (D.C. Cir. 2013) (Randolph, J., concurring in part and concurring in the judgment). He suggests that because "[s]ubchapter S disregards the corporate form" for income tax purposes, allowing income to pass through to shareholders, it makes sense to allow a similar pass through theory for RFRA purposes. *Id.* Although his argument is relatively strained, consideration of a particular corporate form certainly may be relevant in determining how a corporation exercises religion.

290. *See State by State Legislative Status: Enacted Legislation*, BENEFIT CORP. INFO. CENTER, http://benefitcorp.net/state-by-state-legislative-status (last visited May 5, 2014).

es."[291] They must have a "purpose to create a material positive impact on society and the environment."[292] Unlike constituency statutes, the directors of benefit corporations are required to consider non-financial interests when making decisions for the corporation.[293] A benefit corporation whose mission has a religious component would be required to consider religious interests in it decision-making,[294] which makes determining the corporation's religious exercise much more straightforward.

Courts should also consider operational factors in determining a corporation's religious beliefs and exercise. These operational factors include: the kinds of products or services the corporation provides, such as products or services that promote a certain religion or have religious aspects; the percentage of the corporation's funds allocated for religious purposes, such as donations to a particular church or religious organization or, as in Hobby Lobby and Mardel, funds the corporation spends on its own religious activity; the branding and marketing of the corporation, such as whether the corporation holds itself out as a religious or faith-based business to the general public; and the corporate culture.

By examining these organizational and operational factors, the court can more easily determine the sincerity of a corporation's religious beliefs. Although the Briscoe dissent expressed concern that allowing for-profit corporations free exercise rights would "entangle the government in the impermissible business of determining whether for-profit corporations are sufficiently 'religious' to be entitled to protection," using these factors does not entangle the government any more than it is entangled for an individual person.[295] Take, for example, an incorporated butcher that suddenly adopts kosher butcher practices only to avoid complying with FDA regulations requiring butchers to use more expensive, non-kosher techniques. It would be no more difficult to determine the merits of the butcher's free exercise claim than that of an individual who suddenly adopts a religion advocating pacifism only to avoid being drafted in a war. As Judge Hartz pointed out, "[S]incerity questions with respect to corporations should not be unmanageable. It should not be hard to determine who has authority to speak or act for the corporation. And sincerity can be measured by consistency of the present stated belief with the history of the enterprise."[296]

291. CLARK ET AL., *supra* note 282, at 14.
292. *Id.* at 15.
293. *Id.*
294. *Id.*
295. Hobby Lobby Stores, Inc. v. Sebelius, 723 F.3d 1114, 1174–75 (10th Cir. 2013) (Briscoe, C.J., concurring in part and dissenting in part), *cert. granted*, 134 S. Ct. 678 (2013).
296. *Id.* at 1150 (Hartz, J., concurring).

CONCLUSION

First Amendment rights stand as a bedrock of our civil liberties. They prevent the government from imposing upon the thoughts, speech, and actions of its citizens, which are often of central and vital significance to their autonomy and well-being. They also preserve the cultural richness of a diverse society by protecting minority views and beliefs from being silenced and smothered by majority will. The First Amendment protects both the purely personal liberties of the individual as well as the societal interest in a diverse and varied citizenship. It serves both personal and communal interests.

The *Hobby Lobby* decision preserved both of these personal and communal interests by finding that corporations, even for-profit corporations, are entitled to First Amendment protection. It gave individuals the opportunity to carry their religious beliefs with them into the marketplace without having to sacrifice the protections of the corporate form. In the particular case of *Hobby Lobby*, if the court had held otherwise, the family that owns and operates the corporations would have faced the decision to either compromise their religious beliefs or sacrifice the business, which employs over 13,000 employees. This is exactly the kind of governmental coercion that the Free Exercise Clause is meant to protect against.[297] In order to adhere to corporate law, it is important for the corporations seeking free exercise protection to maintain the corporate formalities. Yet the sole fact that a corporation operates for a profit should not exclude it from the protections of the Free Exercise Clause. The factors discussed above can help both courts and corporations seeking free exercise protection identify corporate religious exercise within the bounds of corporate law. Although the *Hobby Lobby* court should have provided more guidance on how to distinguish the religious beliefs of the corporation from its constituents, it ultimately reached the correct decision because it respected the spirit of the Free Exercise Clause and the First Amendment.

Brittany Limes[*]

297. *See id.* at 1139–41 (majority opinion); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222–23 (1963).

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